

## **Assembly Bill No. 1218**

### **CHAPTER 689**

An act to amend Sections 25299.50.1 and 25299.57 of, and to add Article 6.5 (commencing with Section 25299.64) to Chapter 6.75 of Division 20 of, the Health and Safety Code, relating to underground storage tanks, and making an appropriation therefor.

[Approved by Governor October 8, 2003. Filed with  
Secretary of State October 9, 2003.]

#### **LEGISLATIVE COUNSEL'S DIGEST**

**AB 1218, Dutra. Underground storage tanks: claims: performance-based contracts: fire safety agency claims.**

(1) Under the existing Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989, owners and operators of petroleum underground storage tanks requires every owner of an underground storage tank to pay a storage fee for each gallon of petroleum placed in the tank. The fees are required to be deposited in the Underground Storage Tank Cleanup Fund. The money in the fund may be expended by the State Water Resources Control Board, upon appropriation by the Legislature, for various purposes, including the payment of claims to aid owners and operators of petroleum underground storage tanks who take corrective action to clean up unauthorized releases from those tanks.

This bill would authorize the board to pay a claim to reimburse the cost of a performance-based contract that is approved by the board as being consistent with the requirements of the bill. The bill would require a performance-based contract to include specified terms and would require the board to make payments under a performance-based contract based upon the reduction of designated constituents of concern to specified concentrations.

The bill would require the board to advertise the bidding for a performance-based contract and would require the board to be the receiving address for bids.

(2) The act establishes the Fire Safety Subaccount in the fund and appropriates the moneys in that subaccount for expenditure by the board to pay specified claims filed by a fire safety agency, as defined. The subaccount is repealed on January 1, 2006, and any funds remaining therein are required to be transferred to the fund.

Existing law requires an appropriation to be available for encumbrance for 3 years after the date on which it first becomes available for encumbrance.

The bill would require funds appropriated for expenditure from the subaccount to be eligible for encumbrance until June 30, 2004, thereby making an appropriation, and would require those encumbered funds to be liquidated no later than December 31, 2005.

Appropriation: yes.

*The people of the State of California do enact as follows:*

SECTION 1. Section 25299.50.1 of the Health and Safety Code is amended to read:

25299.50.1. (a) For purposes of this section, “fire safety agency” means a city fire department, county fire department, city and county fire department, fire protection district, a joint powers authority formed for the purpose of providing fire protection services, or any other local agency that normally provides fire protection services.

(b) The Fire Safety Subaccount is hereby created in the Underground Storage Tank Cleanup Fund, for expenditure by the board to pay a claim described in paragraph (4) of subdivision (b) of Section 25299.52 that was filed before January 1, 2000, by a fire safety agency. Except as provided in subdivision (d), the board shall pay a claim filed by a fire safety agency only from funds appropriated from the Fire Safety Subaccount.

(c) The sum of five million dollars (\$5,000,000) of the moneys in the fund derived from the sources described in paragraphs (1) to (4), inclusive, of subdivision (b) of Section 25299.50 is hereby transferred from the fund to the Fire Safety Subaccount, and appropriated therefrom to the board, for expenditure pursuant to this section for a claim filed by a fire safety agency specified in subdivision (b).

(d) The unpaid amount of a claim filed by a fire safety agency specified in subdivision (b), for which a closure letter has not been issued pursuant to subdivision (g) of Section 25296.10 on or before January 1, 2006, may not be paid from funds in the Fire Safety Subaccount, but shall revert to the priority ranking for claims specified in Section 25299.52.

(e) The payment of claims pursuant to this section may not affect the board’s payment of claims filed pursuant to paragraph (1), (2), or (3) of subdivision (b) of Section 25299.52.

(f) Any funds remaining in the Fire Safety Subaccount on January 1, 2006, shall be transferred to the fund.

(g) Notwithstanding Section 16304 of the Government Code, any funds appropriated for expenditure pursuant to this section shall be eligible for encumbrance until June 30, 2004. Notwithstanding Section



16304.1 of the Government Code, those encumbered funds shall be liquidated on or before December 31, 2005.

(h) This section shall remain in effect only until January 1, 2006, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2006, deletes or extends that date.

SEC. 2. Section 25299.57 of the Health and Safety Code is amended to read:

25299.57. (a) If the board makes the determination specified in subdivision (d), the board may only pay for the costs of a corrective action that exceeds the level of financial responsibility required to be obtained pursuant to Section 25299.32, but not more than one million five hundred thousand dollars (\$1,500,000) for each occurrence. In the case of an owner or operator who, as of January 1, 1988, was required to perform corrective action, who initiated that corrective action in accordance with Division 7 (commencing with Section 13000) of the Water Code or Chapter 6.7 (commencing with Section 25280), and who is undertaking the corrective action in compliance with waste discharge requirements or other orders issued pursuant to Division 7 (commencing with Section 13000) of the Water Code or Chapter 6.7 (commencing with Section 25280), the owner or operator may apply to the board for satisfaction of a claim filed pursuant to this article. The board shall notify claimants applying for satisfaction of claims from the fund of eligibility for reimbursement in a prompt and timely manner and that a letter of credit or commitment that will obligate funds for reimbursement shall follow the notice of eligibility as soon thereafter as possible.

(b) (1) For claims eligible for reimbursement pursuant to subdivision (c) of Section 25299.55, the claimant shall submit the actual cost of corrective action to the board, which shall either approve or disapprove the costs incurred as reasonable and necessary. At least 15 days before the board proposes to disapprove the reimbursement of corrective action costs that have been incurred on the grounds that the costs were unreasonable or unnecessary, the board shall issue a notice advising the claimant and the lead agency of the proposed disallowance, to allow review and comment.

(2) The board shall not reject any actual costs of corrective action in a claim solely on the basis that the invoices submitted fail to sufficiently detail the actual costs incurred, if all of the following apply:

(A) Auxiliary documentation is provided that documents to the board's satisfaction that the invoice is for necessary corrective action work.

(B) The costs of corrective action work in the claim are reasonably commensurate with similar corrective action work performed during the



same time period covered by the invoice for which reimbursement is sought.

(C) The invoices include a brief description of the work performed, the date that the work was performed, the vendor, and the amount.

(c) (1) For claims eligible for prepayment pursuant to subdivision (c) of Section 25299.55, the claimant shall submit the estimated cost of the corrective action to the board, which shall approve or disapprove the reasonableness of the cost estimate.

(2) If the claim is for reimbursement of costs incurred pursuant to a performance-based contract, Article 6.5 (commencing with Section 25299.64) shall apply to that claim.

(d) Except as provided in subdivision (j), a claim specified in subdivision (a) may be paid if the board makes all of the following findings:

(1) There has been an unauthorized release of petroleum into the environment from an underground storage tank.

(2) The claimant is required to undertake or contract for corrective action pursuant to Section 25296.10, or, as of January 1, 1988, the claimant has initiated corrective action in accordance with Division 7 (commencing with Section 13000) of the Water Code.

(3) (A) Except as provided in subparagraph (B), the claimant has complied with Section 25299.31 and the permit requirements of Chapter 6.7 (commencing with Section 25280).

(B) All claimants who file their claim on or after January 1, 1994, and all claimants who filed their claim prior to that date but are not eligible for a waiver of the permit requirement pursuant to board regulations in effect on the date of the filing of the claim, and who did not obtain or apply for any permit required by subdivision (a) of Section 25284 by January 1, 1990, shall be subject to subparagraph (A) regardless of the reason or reasons that the permit was not obtained or applied for. However, on and after January 1, 1994, the board may waive the provisions of subparagraph (A) as a condition for payment from the fund if the board finds all of the following:

(i) The claimant was unaware of the permit requirement prior to January 1, 1990, and there was no intent to intentionally avoid the permit requirement or the fees associated with the permit.

(ii) Prior to submittal of the application to the fund, the claimant has complied with Section 25299.31 and has obtained and paid for all permits currently required by this paragraph.

(iii) Prior to submittal of the application to the fund, the claimant has paid all fees, interest, and penalties imposed pursuant to Article 5 (commencing with Section 25299.40) and Part 26 (commencing with



Section 50101) of Division 2 of the Revenue and Taxation Code for the underground storage tank that is the subject of the claim.

(C) (i) A claimant exempted pursuant to subparagraph (B) shall obtain a level of financial responsibility twice as great as the amount which the claimant is otherwise required to obtain pursuant to subdivision (a) of Section 25299.32.

(ii) The board may waive the requirements of clause (i) if the claimant can demonstrate that the conditions specified in clauses (i) to (iii), inclusive, of subparagraph (B) were satisfied prior to the causing of any contamination. That demonstration may be made through a certification issued by the permitting agency based on site and tank tests at the time of permit application or in any other manner acceptable to the board.

(D) The board shall rank all claims resubmitted pursuant to subparagraph (B) lower than all claims filed before January 1, 1994, within their respective priority classes specified in subdivision (b) of Section 25299.52.

(4) The board has approved either the costs incurred for the corrective action pursuant to subdivision (b) or the estimated costs for corrective action pursuant to subdivision (c).

(5) The claimant has paid all fees, interest, and penalties imposed pursuant to Article 5 (commencing with Section 29299.40) and Part 26 (commencing with Section 50101) of Division 2 of the Revenue and Taxation Code for the underground storage tank that is the subject of the claim.

(e) The board shall provide the claimant, whose cost estimate has been approved, a letter of credit authorizing payment of the costs from the fund.

(f) The claimant may submit a request for partial payment to cover the costs of corrective action performed in stages, as approved by the board.

(g) (1) Any claimant who submits a claim for payment to the board shall submit multiple bids for prospective costs as prescribed in regulations adopted by the board pursuant to Section 25299.77.

(2) Any claimant who submits a claim to the board for the payment of professional engineering and geologic work shall submit multiple proposals and fee estimates, as required by the regulations adopted by the board pursuant to Section 25299.77. The claimant's selection of the provider of these services is not required to be based on the lowest estimated fee, if the fee estimate conforms with the range of acceptable costs established by the board.

(3) Any claimant who submits a claim for payment to the board for remediation construction contracting work shall submit multiple bids, as required in the regulations adopted by the board pursuant to Section 25299.77.



(4) Paragraphs (1), (2), and (3) do not apply to a tank owned or operated by a public agency if the prospective costs are for private professional services within the meaning of Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code and those services are procured in accordance with the requirements of that chapter.

(h) The board shall provide, upon the request of a claimant, assistance to the claimant in the selection of contractors retained by the claimant to conduct reimbursable work related to corrective actions. The board shall develop a summary of expected costs for common remedial actions. This summary of expected costs may be used by claimants as a guide in the selection and supervision of consultants and contractors.

(i) The board shall pay, within 60 days from the date of receipt of an invoice of expenditures, all costs specified in the work plan developed pursuant to Section 25296.10, and all costs that are otherwise necessary to comply with an order issued by a local, state, or federal agency.

(j) (1) The board shall pay a claim of not more than three thousand dollars (\$3,000) per occurrence for regulatory technical assistance to an owner or operator who is otherwise eligible for reimbursement under this chapter.

(2) For the purposes of this subdivision, regulatory technical assistance is limited to assistance from a person, other than the claimant, in the preparation and submission of a claim to the fund. Regulatory technical assistance does not include assistance in connection with proceedings under Section 25296.40, 25299.39.2, or 25299.56 or any action in court.

(k) (1) Notwithstanding any other provision of this section, the board shall pay a claim for the costs of corrective action to a person who owns property on which is located a release from a petroleum underground storage tank that has been the subject of a completed corrective action and for which additional corrective action is required because of additionally discovered contamination from the previous release, only if the person who carried out the earlier and completed corrective action was eligible for, and applied for, reimbursement pursuant to subdivision (b), and only to the extent that the amount of reimbursement for the earlier corrective action did not exceed the amount of reimbursement authorized by subdivision (a). Reimbursement to a claimant on a reopened site shall occur when funds are available, and reimbursement commitment shall be made ahead of any new letters of commitment to be issued, as of the date of the reopening of the claim, if funding has occurred on the original claim, in which case funding shall occur at the time it would have occurred under the original claim.



(2) For purposes of this subdivision, a corrective action is completed when the local agency or regional board with jurisdiction over the site or the board issues a closure letter pursuant to subdivision (g) of Section 25296.10.

SEC. 3. Article 6.5 (commencing with Section 25299.64) is added to Chapter 6.75 of Division 20 of the Health and Safety Code, to read:

Article 6.5. Performance-Based Contract

25299.64. (a) For purposes of this article, the following definitions shall apply:

(1) “Baseline concentration” means the initial concentration of a constituent of concern prior to conducting corrective action pursuant to a performance-based contract.

(2) “Constituent of concern” means the chemical element, compound, or grouping, including, but not limited to, total petroleum hydrocarbons, as in gasoline, that is present in the soil or groundwater and subject to corrective action.

(3) “Performance-based contract” means a written agreement approved by the board between a claimant and an appropriately licensed contractor, where the contractor agrees for a fixed price to take corrective action to reduce the concentrations of designated constituents of concern to specified concentrations.

(4) “Remediation milestone” means that a specified reduction in the concentrations of constituents of concern from baseline concentrations has been attained through corrective action. The reduction is expressed as a percentage of the total reduction required by the performance-based contract.

(b) The board may pay a claim pursuant to Section 25299.57 to reimburse the cost of a performance-based contract if the board approves the contract as being consistent with this article.

(c) A performance-based contract includes, but is not limited to, the total fixed price contract amount, designated constituents of concern, baseline concentrations, and if appropriate, a payment schedule indicating the amount to be paid when specified remediation milestones are attained.

(d) The board shall make payments based upon the reduction in the concentrations of designated constituents of concern to specified concentrations. If corrective action is estimated to take six months or more to achieve these concentrations and the remediation technology proposed is a pump-and-treat or other type of mechanical remediation technology, the board may pay a portion of the fixed price based on the





attainment of specified remediation milestones or other performance parameters, in the following manner:

(1) The first payment shall include the amount of incurred capital costs upon successful installation and startup of the mechanical remediation system.

(2) The second payment shall be an amount equal to the agreed upon percent of the total contract price when the 25 percent remediation milestone is attained.

(3) The third payment shall be equal to an agreed upon percent of the total contract price when the 50 percent remediation milestone is attained.

(4) The fourth payment shall be equal to an agreed upon percent of the total contract price when the 75 percent remediation milestone is attained.

(5) The fifth payment shall be equal to an agreed upon percent of the total contract price when the 100 percent remediation milestone is attained.

(6) The final payment shall be the amount of the remaining contract price that shall be paid when the 100 percent remediation milestone has been maintained for one year following cessation of all active remediation.

25299.65. (a) The claimant shall submit multiple bids for a performance-based contract in accordance with paragraph (1) of subdivision (g) of Section 25299.57 and any regulations adopted by the board to implement that section.

(b) To assist claimants in soliciting bids for performance-based contract projects, the board shall advertise bid solicitations for these projects through the board's Web site. The board shall be the receiving address for the bids, and shall offer other assistance, upon request, in accordance with the regulations adopted pursuant to this chapter. The bids shall be sealed prior to submittal to the board. This subdivision does not prevent the board from approving a performance-based contract covering multisite cleanups, if the board determines that economies of scale will assist claimants in soliciting bids or reducing overall costs.

(c) The sites for which the board may consider approving a performance-based contract include, but are not limited to, all of the following:

(1) A site that had an unauthorized release reported to the board, the regional board, or local agency five or more years ago and active remediation has not begun.

(2) A site where corrective action has been implemented for two or more years pursuant to a corrective action plan that was approved by the board, the regional board, or local agency, but that corrective action has





not been effective in reducing the concentrations of the constituents of concern to the satisfaction of that board or agency.

(3) A site where corrective action costs are expected to exceed the maximum fund reimbursement amount prior to case closure.

(4) A site where the board, the regional board, or local agency has recently determined that an unauthorized release has occurred that has the potential to impact nearby receptors or otherwise cause significant impact to the waters of the state.

(5) A site where an unauthorized release of MTBE, as defined in paragraph (2) of subdivision (a) of Section 25299.97, has occurred and corrective action has not been initiated or satisfactorily conducted, as determined by the board, the regional board, or local agency, or according to any regulations adopted pursuant to Section 25296.30.

(6) A site where the board, the regional board, or local agency has determined that corrective action other than ongoing monitoring of groundwater is more likely to reduce the concentrations of constituents of concern sooner and at a lower cost.

(d) This article does not preclude a claimant from requesting board approval of a performance-based contract to conduct corrective action at the claimant's site.

25299.66. This article does not limit or abridge the powers and duties granted to the board, the regional board, or local agency pursuant to any other provision of law.

